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ABSTRACT

The future of cybercounseling will be greatly affected by state efforts to regulate it. Cybercounseling will probably be found by some courts to violate state licensing laws. The risk of prosecution under those laws is substantial and undoubtedly has already stunted the growth of cybercounseling in the United States. Few, if any, state licensing laws expressly address on-line counseling, so arguments can be made that state laws currently do not prohibit it. These arguments may succeed in some states, and will be helped by carefully worded legal disclaimers and descriptions of services on cybercounselors' Web sites. The following three possible defenses for cybercounselors are discussed in this chapter: (1) the counselor and the client agreed that the services were not subject to the licensing laws of the client's state; (2) the client's state has no right to arrest and extradite a counselor who was physically in another state at the time the services were provided; (3) cybercounselors may also be able to defend themselves from charges of practicing without a license by raising a free speech defense. This chapter also provides recommendations for cybercounselors practicing interstate. (Contains 18 notes.) (MKA)

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Cybercounselors v. Cyberpolice

JEFFREY S. LOVE

Do cybercounselors practicing interstate risk arrest, prosecution, and conviction in their clients' home states for counseling without a local license? That is the primary legal issue facing cybercounselors who practice nationwide.

One example of a state that warns all providers of Internet services to state residents that they must comply with all state laws is Minnesota. Minnesota is also an example of a state that has prosecuted on-line providers of some goods and services, such as gambling bookies, for violating state law. The Minnesota attorney general's web site states

> WARNING TO ALL INTERNET USERS AND PROVIDERS
>
> THIS MEMORANDUM SETS FORTH THE ENFORCEMENT POSITION OF THE MINNESOTA ATTORNEY GENERAL'S OFFICE WITH RESPECT TO CERTAIN ILLEGAL ACTIVITIES ON THE INTERNET.
>
> PERSONS OUTSIDE OF MINNESOTA WHO TRANSMIT INFORMATION VIA THE INTERNET KNOWING THAT INFORMATION WILL BE DISSEMINATED IN MINNESOTA ARE SUBJECT TO JURISDICTION IN MINNESOTA COURTS FOR VIOLATIONS OF STATE CRIMINAL AND CIVIL LAWS.

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The following discussion sets out the legal basis for this conclusion. Minnesota's general criminal jurisdiction statute provides as follows:

A person may be convicted and sentenced under the law of this state if the person: (1) Commits an offense in whole or in part within this state; or (2) Being without the state, causes, aids, or abets another to commit a crime within the state; or (3) Being without the state, intentionally causes a result within the state prohibited by the criminal laws of this state. It is not a defense that the defendant's conduct is also a criminal offense under the laws of another state or of the United States or of another country. Minnesota Statute Section 609.025 (1994).

This statute has been interpreted by the Minnesota Supreme Court. In State v. Rossbach, 288 N.W.2d 714 (Minn. 1980), the defendant appealed his conviction for aggravated assault. The defendant, standing inside the border of an Indian reservation, had fired a rifle across the boundary line at a person outside the border. The defendant claimed that Minnesota courts did not have jurisdiction because his act took place off of Minnesota lands. Applying Minnesota Statute Section 609.025 and the common law, the Minnesota Supreme Court affirmed the conviction, holding that the intentional impact within Minnesota land created jurisdiction. Id. at 715-16.[1]

The web site includes press releases on enforcement actions against Internet crimes, such as the following:

LANDMARK MINNESOTA DECISION DECLARES THAT STATES CAN ADDRESS LAWBREAKING ON INTERNET
Humphrey's Case Against Cyber-Bookie First To Establish State Jurisdiction Over 'Net

Attorney General Hubert Humphrey III today lauded a state trial court's landmark decision finding that his office has jurisdiction to enforce Minnesota's false advertising and consumer fraud laws against a Las Vegas company offering gambling services over the Internet.

"In the eyes of the law, it's the behavior that matters, not the medium," Humphrey said. "Whether a company solicits using

the telephones, the mails, television, or the Internet, the rules against fraud and illegal conduct are the same. There is no 'Internet exception' in our consumer protection laws."

Humphrey filed a consumer fraud and false advertising suit in July 1995 against Granite Gate Resorts and its president, Kerry Rogers, in Ramsey District Court. The lawsuit alleges that the defendants operate a web site on the Internet which advertises illegal sports betting and information services. The lawsuit charges that by falsely claiming that these services are legal, the defendant's advertisements violate Minnesota's consumer protection laws. The defendants asked the court to dismiss the state's lawsuit, claiming that they are not subject to Minnesota's laws because they are based in Las Vegas.

In finding the state can enforce its laws against the defendants, Ramsey County District Judge John S. Connolly relied on evidence showing that defendants actively targeted Minnesota residents. For example, the court found that during a 2-week period in February and March of 1996, at least 248 Minnesota computer users viewed the defendants' gambling web site. The court also noted that two Minnesotans were on a list kept by the defendants of the top 500 computer users accessing the defendants' web sites.[1]

Minnesota is not alone in its desire to regulate the on-line provision of goods and services, including health care services. State and federal officials are tightening laws against telemedicine practitioners[2] and on-line pharmacists.[3] State psychology and counseling boards are considering proposals expressly to restrict on-line counseling. It is only a matter of time before some state enforces its licensing laws against out-of-state cybercounselors. Because it is unrealistic to expect cybercounselors to become licensed in every state, such enforcement of local licensing laws could destroy interstate cybercounseling as a viable profession for experienced and responsible counselors. Even now, uncertainty regarding the legality of interstate cybercounseling has undoubtedly deterred many conscientious and qualified counselors from starting an on-line practice. What defenses could a cybercounselor raise to a charge of practicing without a local license in a client's home state? This

chapter discusses three potential defenses for cybercounselors and then presents recommendations for interstate practice. The defenses are that

1. the counselor and client agreed that the services were not subject to the licensing laws of the client's state;
2. the client's state has no right to arrest and extradite a counselor who was physically present in another state at the time the services were being provided; and
3. the counselor has a constitutional right to practice cybercounseling without a license under the free speech clause of the First Amendment of the U.S. Constitution and free speech provisions of some state constitutions.

Most potential legal defenses to a charge of unlicensed practice are premised on the contention that state and federal legislators and state licensing boards have failed to enact laws clearly and unequivocally prohibiting all forms of cybercounseling. If such laws were enacted, those defenses would disappear. The only defense discussed in this chapter that could survive a concerted attempt by lawmakers to outlaw cybercounseling is the freedom of speech defense based on the First Amendment of the U.S. Constitution and similar provisions of some state constitutions. That constitutional defense is unique. It raises issues of personal freedom and individual rights that go beyond the question of whether cybercounseling is an effective and safe form of therapy. It contends that, even if cybercounseling is demonstrably less safe and less effective than in-person counseling and other psychotherapies (such as drugs and electric shock therapy), it is nevertheless a type of activity that the public has a right to choose.

The dangers associated with speech and the communication of ideas are ones that our country chose to embrace in the Bill of Rights, the Fourteenth Amendment, and many state constitutions. This choice was made in part to avoid potentially greater dangers associated with empowering government officials to regulate freely what people may say and hear, and the means through which they may communicate it. Efficacy, cost, and safety may be the sole relevant grounds for deciding whether to legalize or outlaw particular psychotherapeutic drugs. But should they also be the sole grounds

for deciding whether to outlaw particular forms of talking therapies?

Consider the issue at its logical extreme. If some studies found that psychotherapeutic drugs were safer, less costly, and more effective than all talking therapies, should those be the sole grounds for deciding whether to outlaw all talking therapies in favor of psychotherapeutic drugs? Or would issues of individual rights and freedom of speech then be appropriate considerations? Would any rights of preeminent importance be lost—beyond the loss common to the prohibition of any potentially therapeutic activity or drug—if the public were prohibited from obtaining private, professional counseling altogether?

Counselors are in the best position to determine whether talking therapies in general, and cybercounseling in particular, promote any values that the First Amendment was intended to protect, such as freedom of thought and intellectual growth. If so, then issues of individual rights and freedoms should be considered by counselors, counseling boards, and legislators in determining whether to outlaw cybercounseling, or how closely to regulate it. Although these issues are discussed in this chapter only in the context of a potential legal defense to a charge against a cybercounselor of violating a state's practice act, they are relevant to the broader issue of whether and how cybercounseling should be regulated.

FIRST POTENTIAL DEFENSE: THE CLIENT AGREED THAT LOCAL LAWS DID NOT APPLY

Counselors' agreements with clients often include limitations on or disclaimers of legal obligations. Cybercounselors' web sites often address topics such as the following (the examples are provided for illustration only, and are not intended as recommendations):

- **choice of law:** For example, "Oregon law applies to any disputes or claims arising out of this counseling service."
- **choice of venue:** For example, "Any lawsuit arising out of these services may be filed and tried only in the State of Oregon."
- **arbitration:** For example, "Either party may compel arbitration of any claims or disputes arising out of these counseling services under the following terms and conditions: . . . . "

- **location of services:** For example, "Users agree that these counseling services shall be considered for all legal purposes to be provided in the State of Oregon only."
- **limitations on the nature and scope of the services:** For example, "Important differences between cybercounseling and face-to-face psychotherapy limit the responsibilities assumed by counselors on this web site. Although psychotherapy includes elements of both treatment and educational processes, cybercounseling is almost exclusively an educational process. During psychotherapy, counselors are responsible for the treatment of the patient and exercise substantial control over the therapeutic process. This is only possible in the face-to-face environment of traditional psychotherapy. During cybercounseling, users are responsible for their own treatment. Users control completely the information received by the counselors, and the interventions applied (if any). Cybercounselors provide information based on the users' statements but cannot provide users with significant emotional support. For these reasons, cybercounseling is not a substitute for traditional psychotherapy. It is self-help in which users completely control the treatment."[4]
- **limitations on damages:** For example, "Users agree that in any lawsuit arising out of these services, consequential damages, emotional distress damages, and punitive damages shall not be recoverable. Damages awarded shall not exceed the fees paid for these services."
- **limitations on side agreements and oral modifications:** For example, "Users agree that the terms stated on this web site comprise the entire agreement governing these services. No other agreement or representation governs these services. Modifications of these terms are not effective unless agreed to in writing."
- **indemnity:** For example, "Users agree to indemnify and hold harmless the counselors providing these services from any and all liability, costs, attorney fees, and other legal expenses arising out of these services, to the maximum extent allowed by law."

Courts enforce client agreements to waive or limit legal rights, unless courts find that it would undermine an overriding public policy. For example, courts often enforce agreements to arbitrate

disputes, or to apply a certain state's law or use a certain state's courts (so long as that state has some connection to the dispute). But courts sometimes refuse to enforce disclaimers purporting to strip consumers of a convenient remedy in their home states for consumer fraud on the ground that overriding public policies against fraud or malpractice are at stake. In short, in suits brought by clients, sometimes disclaimers help and sometimes they don't.

Although clients can waive their own legal rights, they cannot waive the rights of state officials (such as district attorneys and state licensing boards) to file civil or criminal actions against cybercounselors for practicing without a license. Disclaimers bind only the contracting parties. State officials are not parties to any agreements between cybercounselors and their clients. Thus even if clients are bound by their agreements on arbitration, choice of venue, choice of law, and limitations on damages, state prosecutors and counseling boards are not.

Client agreements on the scope of legal services can, however, be used as evidence that the cybercounselor's services are outside the definitions of *counseling* or *psychology* in state licensing laws. Cybercounselors might defend a charge of unlicensed practice by arguing that state law requires a license only for mental health "treatment," and the cybercounseling agreement states that only "education" (or spiritual advice or personal consulting) and "not treatment" is being provided. That defense has been raised by some unlicensed therapists in response to charges of unlicensed practice. It is comparable to an argument by on-line psychics that their services are not fraudulent because their web sites state that the services are "for entertainment purposes only." The issue of whether all counseling is necessarily "therapy" is fairly debatable.[5]

Agreements with clients can also support an argument that licensing laws of the client's state do not govern counselors in other states. Many state licensing laws do not specifically address counseling provided by counselors in another state, whether by telephone, mail, or computer. State legislatures did not have those practices in mind when they enacted the licensing laws, and so the laws do not expressly address them. This often creates ambiguities or vagueness in the laws that cybercounselors can use to argue that a license in their client's home state is not necessary. For example,

the Mississippi attorney general has issued an official opinion that out-of-state physicians treating patients in Mississippi on-line are not subject to Mississippi's licensing requirement. The Mississippi State Board of Medical Licensure disagrees, but the attorney general determined that the state definition of *practicing medicine* does not include an out-of-state physician practicing telemedicine across state lines.[6] In a comparable dispute involving out-of-state counseling, a disclaimer stating that the services shall be considered for all purposes to be provided only in the counselor's home state, and shall be governed by the law of that state only, could help persuade a judge that the law of the client's state does not apply.

Client agreements can also help avoid or defend against a charge that the cybercounselor's web site includes false, misleading, or deceptive statements. Note that the Minnesota attorney general's press release quoted earlier identifies the charge against the on-line bookie as false advertising ("The lawsuit charges that by falsely claiming that these services are legal, the defendant's advertisements violate Minnesota's consumer protection laws"). Such a charge could be avoided by a disclaimer stating that the legality of on-line services is unclear, and that some states may contend that a license in their state is necessary.

Disclaimers are more likely to be enforced by courts if they are conspicuous, comprehensible, accurate, and reasonable. Often they are not. Legal disclaimers on cybercounselors' web sites vary widely in content, length, placement, comprehensibility, and style. Some are simply unintelligible, and read as if they were largely copied from contracts on other matters. Because cybercounseling is a novel practice, there are no "form disclaimers" that have been tested over the years in the courts. Disclaimers should be tailor-made and should specifically address the practitioner's views on the nature and scope of the services being provided and the manner in which any disputes should be resolved. The best disclaimers are simply written, are conspicuous, and contain helpful information about the services being provided. The counselors probably spent many hours helping to draft them. Significant work by the counselors on the content of legal disclaimers helps ensure that they are clear, accurate, and reasonable.

SECOND POTENTIAL DEFENSE: STATES HAVE NO RIGHT TO EXTRADITE COUNSELORS

What gives officials in one state the right to arrest and extradite cybercounselors in another state for services performed by the counselor entirely in that other state? Extradition arguably should not be available, especially because the charge of violating state licensing laws is often merely a technical violation and not a felony or other serious crime.

Extradition is addressed by the United States Constitution at Article IV, Section 2, clause 2, which provides

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he [or she] fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

This is supplemented by a federal extradition law, 18 U.S.C. 3182, which provides, in part,

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State . . . to which such person has fled, and produces a copy of any indictment found or an affidavit made before a magistrate of any State . . . charging the person demanded with having committed treason, felony, or other crime, . . . the executive authority of the State . . . to which such person has fled shall cause him [or her] to be arrested and secured . . . to be delivered to such agent [of the demanding State] when he [or she] shall appear. . . .

The words *felony, or other crime* in those laws arguably require that the charge be for violating a serious criminal law. Because misdemeanors and licensing law violations are not specifically mentioned, arguably cybercounselors cannot be extradited for violating such laws. However, the U.S. Supreme Court has rejected the argument that the crime must be serious, and has held that a person may be extradited on charges of violating any state law, including a misdemeanor.[7]

The words *fugitive* and *flee from justice* arguably require that the person have been in the charging state at the time the crime was allegedly committed. That argument has been accepted by the U.S. Supreme Court. A person not within a state at the time the crime was allegedly committed cannot be deemed a fugitive for purposes of those laws, and so cybercounselors cannot be extradited under those federal laws.[8]

The states have enacted their own uniform extradition laws, however. The Uniform Criminal Extradition Act expressly provides for the extradition of any person charged

> with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand; . . . notwithstanding that the accused was not in that state at the time of the commission of the crime and has not fled therefrom. (ORS 133.767)

The language is quoted from an Oregon statute, but most other states' laws are similar. The word *intentionally* may seem to offer a defense to cybercounselors who subjectively "intended" to practice under only their home state's laws, and who may be unaware of the laws of their clients' states. But in general, ignorance of the law is no excuse. Only the "result" need be intended, not the legal violation. So long as cybercounselors intend to offer services to people residing in other states, the "intent" requirement is probably satisfied.

The intent requirement is arguably not satisfied by a cybercounselor who intends to counsel only clients in the counselor's home state. This intention can be proved by a statement to that effect on the counselor's web site, and a requirement that each client disclose the client's home state. Under such circumstances, ignorance of the fact that the client truly lives in another state may be a defense. If the counselor unintentionally counseled someone from another state due to the client's misrepresentation of his or her residence, the counselor could argue that the intent required for extradition is lacking.

In general, however, cybercounselors can be arrested and extradited for trial in their clients' home states under the Uniform Criminal Extradition Act on charges of counseling clients without a

license. The primary barrier to arrest and extradition is a practical one. It is costly for states to extradite people from one state to another, costly to try them, and costly to enforce any criminal penalties. Administrative approval for those expenses must be obtained. It is unlikely that states will approve such expenses unless the state has made the issue a law enforcement priority, or the counseling is connected to some more serious crime (such as a murder or suicide committed by a client who had forewarned the counselor).

State officials may also bring a civil action against out-of-state cybercounselors for practicing without a license without extraditing the counselor, usually by merely hiring someone to personally hand the counselor a copy of a summons and complaint. In a civil action, the state is limited to seeking a money judgment for past violations and a court order prohibiting future violations. The state cannot seek a criminal conviction or jail sentence. But because civil proceedings are less expensive than criminal proceedings, the risk that state officials will file civil charges against out-of-state cybercounselors is greater.

A state court's power to enter judgment, civil or criminal, against a resident of another state is limited by the due process clause of the Fourteenth Amendment to the U.S. Constitution, which provides in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." If a nonresident counselor is sued in a state with which the counselor has no contacts whatsoever, the court should dismiss the lawsuit for lack of personal jurisdiction. The counselor must raise this defense promptly or it will be waived. For the state court to deny a counselor's timely motion to dismiss for lack of personal jurisdiction, the person prosecuting the lawsuit (whether that person is a state official or a private plaintiff) must at a minimum prove that the suit does not violate the counselor's constitutional right to due process.

> [D]ue process requires that in order to subject a defendant to a judgment . . . , if he [or she] be not present within the territory of the forum, he [or she] have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." (*International Shoe v. Washington*, 326 US 310 [1945])

The court must find that the counselor's conduct and connection with the state is such that the counselor should reasonably anticipate having to defend a lawsuit there. (See *World-Wide Volkswagen Corp. v. Woodson*, 444 US 286, 297 [1980]). The Supreme Court has held that wire communications alone may suffice to establish this, so long as the communications are purposefully directed toward residents of the state and other factors make the assertion of jurisdiction fair:

> Although territorial presence frequently will enhance a potential defendant's affiliation with a state and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a state in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another state, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. . . . Once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." (*Burger King Corp. v. Ruzdewicz*, 471 US 462, 476 [1985])

The U.S. Supreme Court has yet to decide whether on-line counselors or other service providers may fairly be sued in their clients' home states based solely on their provision of on-line services. Most lower courts that have considered the issue of jurisdiction based on web sites have held that a merely passive web site alone does not subject its owner to out-of-state lawsuits,[9] but an interactive web site directed at out-of-state residents for the purpose of doing on-line business with them does make it fair for courts in the customers' home states to proceed with lawsuits against the web site's owner related to that on-line business.[10]

Courts probably will hold that cybercounselors who direct their web sites at out-of-state residents for the purpose of providing on-

going on-line counseling for a fee should fairly anticipate being sued in their clients' home states over disputes arising out of those services. State officials probably can prosecute civil or criminal lawsuits against nonresident cybercounselors based solely on their on-line counseling activities without violating the counselors' constitutional right to due process of law.

THIRD POTENTIAL DEFENSE: CYBERCOUNSELING IS PROTECTED BY THE FIRST AMENDMENT

At least one state has declared that counselors have the "right" to practice their skills freely and the public has the "right" to choose any counselor. The state of Washington's counselor registration law provides that

> . . .The legislature recognizes the right of all counselors to practice their skills freely, consistent with the requirements of the public health and safety, as well as the right of individuals to choose which counselors best suit their needs and purposes. . . . (RCW 18.19.010).

Washington's law protects these rights by allowing counselors of any "therapeutic orientation, discipline, theory, or technique" to register with the state and practice professionally so long as they follow reasonable ethical constraints and disclose to their clients their qualifications, training, and orientation. (See RCW sections 18.19.020, 18.19.060, and 18.19.090.) Colorado has a similar registration law for unlicensed psychotherapists: C.R.S. Title 12 (Professions and Occupations), Article 43 (Mental Health), section 12-43-702.5 (see also sections 12-43-214 and 12-43-222 to 224).

What is the source of these rights? Comparable rights are not mentioned in Washington's laws for other professions, such as law, medicine, and accounting. What makes counseling different?

Counseling is different from most professions in part because it consists entirely—or almost entirely—of pure speech. Counselors communicate with individuals about their personal problems and aspirations for the purpose of helping them. This suggests one possible source of a right to engage in professional counseling. As stated by one philosophical counselor and psychoanalyst,

> While wanting to be mindful of the potential for harming the vulnerable, I wish to champion the legitimacy of applied philosophy and of philosophical counseling, down to and including much that might be popularly understood as "psychotherapy." This is partly because I genuinely believe that the extensive study of philosophy is very practical in many ways. . . . Partly, it is because I believe very strongly in freedom. This is about freedom of speech. The sort of "psychotherapy" I am interested in is a matter of talking. No one should need a license to talk.[11]

The First Amendment to the U.S. Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech . . . ." By its terms the First Amendment applies only to Congress. However, in the 1920s the U.S. Supreme Court held that freedom of speech is a fundamental liberty protected against state abridgment by the due process clause of the Fourteenth Amendment. Even broader free speech provisions are found in some state constitutions. Arguably, state licensing laws that unreasonably prevent residents from obtaining on-line counseling from nonresident cybercounselors violate the free speech rights of the residents and cybercounselors.

Although state licensing laws punish only counselors and not clients for unlicensed practice, as a practical matter the laws still greatly restrict clients' ability to speak with the counselors of their choice. States justify licensing laws by the need to protect clients from unqualified practitioners, but they apply the laws to the counseling of all clients regardless of whether the clients need or want such protection. Thus the issue is not just whether cybercounselors have a right to practice. The issue is also whether clients have a right freely to choose their counselor. See *Monteiro v. The Tempe Union High School District*, 158 F2d 1022, 1027 and n 5 (9th Cir 1998) ("the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his [or her] own rights of speech, press, and political freedom"); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (it is "now well established that the Constitution protects the right to receive information and ideas"); *Procunier v. Martinez*, 416 U.S. 396, 408-409 (1974) ("Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it

is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. . . . [T]he addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication").

The concern of state officials over possible adverse reactions of clients to the unlicensed advice of cybercounselors is not by itself a reason for courts to deny all First Amendment protection to cybercounseling. The U.S. Supreme Court has repeatedly held that state "regulations that focus on the direct impact of speech on its audience" are subject to strict scrutiny under the First Amendment—*Boos v. Barry*, 485 U. S. 312, 321 (1988). See also *Forsyth County v. Nationalist Movement*, 505 U. S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation"), and *Reno v. ACLU*, 521 US 844, 868 (1997) ("the purpose of the CDA is to protect children from the primary effects of 'indecent' and 'patently offensive' speech [on the Internet], rather than any 'secondary' effect of such speech. Thus the CDA is a content-based blanket restriction on speech and, as such, cannot be 'properly analyzed as a form of time, place, and manner regulation'").

The fact that cybercounseling is provided over the Internet does not mean that states are free to regulate it. The Supreme Court recently held that on-line speech is as fully protected under the First Amendment as off-line speech—*Reno v. ACLU*, 521 US 844 (1997).

The fact that cybercounselors usually charge a fee for their services does not mean that states are free to restrict it. "It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. . . . Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way"—*Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943); see also *Spiritual Psychic Science Church v. Azusa*, 39 Cal.3d 501, 508, 217 Cal. Rptr. 225, 228-29 (1985). The United States Supreme Court has repeatedly held that speech does not lose protection under the First Amendment merely because a fee is charged.[12] The practices of professional musicians, authors, stage and movie theater owners, public speakers, and private tutors are all protected by the right to freedom of speech, even though they charge fees. State courts in Oregon and California have held that

professional fortune telling and palm reading are protected by the free speech clauses in the Oregon and California state constitutions. Their rationale is straightforward: laws prohibiting those professions are unconstitutional because the professions consist entirely—or largely—of speech for the purpose of communicating ideas (as opposed to speech that is merely an incidental tool for accomplishing some activity, such as the purchase of a business, making of a will, or surgery).[13]

A federal trial court in San Francisco recently rejected the argument that psychoanalysis is protected speech under the First Amendment. California's Psychology Licensing Law requires a license to practice psychoanalysis (or counseling), but does not offer a license in psychoanalysis (or counseling, except for marriage and family therapy). A national association of psychoanalysts and several individual analysts filed suit alleging that California's Psychology Licensing Law is an unconstitutional restriction on their and their prospective clients' rights to freedom of speech. The court held that the therapeutic purpose of psychoanalytic discussions strips them of all First Amendment protection:

> Psychoanalysis may very well rely heavily on speech . . . [but] the key component of psychoanalysis is the treatment of emotional suffering and depression, not speech. . . . That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection.[14]

The court's opinion does not explain why a therapeutic purpose should strip speech of First Amendment protection. The U.S. Supreme Court has held that the First Amendment protects even speech and expression intended or known to cause emotional suffering, such as marches by neo-Nazis through Jewish neighborhoods, hateful public speeches and literature, flag burning protests, antiabortion protests, antiabortion "street-counseling" of patients approaching abortion clinics, vulgar parodies and caricatures of public figures in magazines and other media, publication of embarrassing and defamatory facts, personal insults and obscenities, and harsh and mean spirited criticisms. Why would, or should, courts deny protection to speech intended to relieve emotional suffering? The reason is hardly obvious.

The psychoanalysts have appealed the trial court's decision to the Ninth Circuit Court of Appeals. If the Ninth Circuit determines that psychotherapy is protected by the First Amendment, that decision will provide cybercounselors with a powerful defense to any charge of practicing without a license brought by states within the Ninth Circuit (California, Oregon, Washington, Alaska, Hawaii, Arizona, Nevada, Idaho, and Montana). It will also be a helpful precedent in defending against such charges brought by other states. Ultimately, whether cybercounselors have a constitutional right to practice in states where they are not licensed is an issue that can be finally resolved only by the U.S. Supreme Court, and the supreme courts of those states (such as Oregon and California) whose constitutions provide even broader free speech rights than the U.S. Constitution.

If cybercounselors have a First Amendment defense to prosecution under state licensing laws, the First Amendment still may not be a successful defense to prosecution under less burdensome laws. First Amendment rights are not absolutes. For example, the First Amendment clearly protects the rights of counselors and other professionals to advertise their qualifications and lawful services truthfully. Courts have declared laws unconstitutional that purport to restrict therapists from truthfully advertising their services as psychotherapy and psychological counseling and using the title psychotherapist and (for master's-level psychologists) the title psychologist.[15] But those same laws do not violate the First Amendment when applied to therapists who falsely claim that they are licensed psychologists or licensed counselors.

If states can prove that restrictions on free speech rights are no more burdensome than is reasonably necessary to protect a significant or compelling government interest, the restrictions are not unconstitutional. See *Madsen v. Women's Health Center*, 512 US 753, 761-65, 781 (1994) (e.g., "the First Amendment protects the speaker's right to offer 'sidewalk [antiabortion] counseling' to all passersby. That protection, however, does not encompass attempts to abuse an unreceptive or captive audience"—Opinion of Justice Stevens, concurring in part and dissenting in part). The problem with licensing laws is that states are unlikely to be able to demonstrate their necessity,[16] especially as applied to cybercounselors

who are highly educated, experienced, nationally certified, and licensed in another state.

In contrast, states should be able to prove the reasonableness and necessity of counselor registration and disclosure laws,[17] such as those in Washington and Colorado (discussed earlier), even as applied to cybercounselors. Such laws offer a level of protection to the public that Washington and Colorado[18] have found adequate, without imposing the much more burdensome requirements for obtaining a state license. Although cybercounselors cannot reasonably be expected to obtain a license in every state and country in which they do business (at least, not until reciprocity provisions become more prevalent), they can reasonably be expected to comply with registration and disclosure laws in each state and country in which they do business. Corporations are expected to register in each state and country in which they do a substantial amount of ongoing business, and readily comply with those laws. State registration requirements for cybercounselors are comparable.

In sum, the First Amendment may be a valid defense to a charge that cybercounselors are violating state licensing laws. It is not a defense to a charge that cybercounselors are engaged in false or misleading advertising. It is probably not a defense to a charge of providing counseling to residents of states with registration and disclosure laws, such as Colorado and Washington, if the cybercounselor fails to comply with those laws.

RECOMMENDATIONS

Cybercounselors practicing interstate should

- include thorough, reasonable, and accurate legal disclaimers and descriptions of services on their web sites;
- promptly consider the defenses discussed in this chapter (disclaimers, lack of personal jurisdiction, improper extradition, and the free speech protection of the First Amendment and state constitutions) if charged or threatened by officials in another state with violating that state's licensing laws;
- comply with counselor registration and disclosure laws in states such as Washington and Colorado; and
- encourage all states to enact counselor registration laws. Although not intended as cybercounseling laws, registration laws

are a simple and reasonable means of both protecting the public by regulating on-line counseling in a manner that counselors can be expected to follow, and assuring cybercounselors that their services are lawful if they do.

CONCLUSION

The future of cybercounseling will be greatly affected by state efforts to regulate it. Cybercounseling probably will be found by some courts to violate state licensing laws. The risk of prosecution under those laws is substantial, and undoubtedly has already stunted the growth of cybercounseling in the United States. The threat is real. States have the power to arrest and extradite out-of-state cybercounselors for providing counseling to residents without a license (although usually the incentive for states to do so will not justify the costs involved). States also generally have the power to serve cybercounselors with a summons and complaint on civil (rather than criminal) charges of practicing without a license, seeking monetary damages and injunctions (as opposed to a jail sentence). Civil charges are the more likely threat because they cost less than criminal charges for the state to prosecute.

Few if any state licensing laws expressly address on-line counseling, so arguments can be made that state laws currently do not prohibit it. These arguments may succeed in some states, and will be helped by carefully worded legal disclaimers and descriptions of services on cybercounselors' web sites.

Cybercounselors may be able to defend themselves from charges of practicing without a license by raising a free speech defense. Cybercounselors can argue that their discussions with clients are protected speech under the First Amendment to the U.S. Constitution and the free speech provisions of some state constitutions. Whether psychotherapy is constitutionally protected speech is only now being tested in the courts. It will be years before the issue is finally decided. Even if psychotherapy is constitutionally protected speech, state regulation of psychotherapy that is demonstrably reasonable and necessary will still be enforceable. Washington and Colorado provide a working model of demonstrably reasonable regulations of the professional practice of psychotherapy. Those states supplement their licensing laws for psychologists, social workers,

and counselors with registration and disclosure laws for unlicensed psychotherapists. This provides substantial protection to the public, without unnecessarily burdening the rights of counselors to practice their profession and the rights of the public freely to choose their counselor.

Whether the First Amendment essentially requires states to follow the Washington and Colorado model is an issue of importance not just to professional psychotherapists but also to the public at large. This is not an issue for just counseling experts to decide. Although experts are in the best position to measure the risks of unlicensed cybercounseling, they are not in a superior position to weigh those risks against the opposing values of having the freedom to speak with the counselor of one's choice. Nor is this an issue just for legislatures. Although legislatures are well positioned to weigh the aggregate risks and benefits of state laws, they are not well positioned to weigh the impact of those laws on individual rights and freedoms. That is why individual freedoms are protected from state legislatures by the federal and state constitutions. Cybercounseling can be a highly personal, educational, spiritual, emotional, and expressive activity. Arguably, it strongly implicates individual rights and freedoms.

State legislatures and law enforcement officials have the power virtually to eliminate cybercounseling as a viable practice for responsible professionals. Counselors, the public, and the courts all have a strong interest in seeing that they use that power responsibly, with due regard for the individual rights and freedoms at stake.

NOTES

[1]www.ag.state.mn.us/home/consumer/consumernews/On-lineScams/memo.html.

[2]See *Findings and Recommendations of the Center for Telemedicine Law Licensure Task Force*. (1997, February 12). ("The difficulties telemedicine practitioners face in meeting differing state licensure requirements have been compounded by recent state actions. During the last two and a half years, at least 11 states have modified their state licensure requirements. In general these states have (1) narrowed the consultation exception; and (2) required all out-of-state physicians to possess a license in a state in order to provide diagnostic or therapeutic services directly on a regular and ongoing basis to patients located in the state.")

[3]See Stolberg, S. (1999, July 31). Officials struggle to regulate on-line sale of prescription drugs. *New York Times*, p. A28. ("The Food and Drug Administration announced steps today to curb the illegitimate sale of prescription drugs over the Internet, while officials at another agency, the Federal Trade Commission, asked Congress to require electronic pharmacies to post detailed on-line information about their licenses and the doctors who write the prescriptions they fill. . . . Now doctors are prescribing pills on line to patients they have never met, in states where they are not authorized to work. Pharmacies are shipping pills across state lines without the requisite licenses. Regulatory authorities have disciplined some doctors and pharmacies, but the work is slow and difficult because the ownership of web sites is so hard to track. . . . Mr. Hubbard, of the F.D.A., said his agency would immediately begin trying to identify each site and learn where it is registered, so the authorities in those states could be alerted.")

[4]A similar limitation on the scope of services was found at www.headworks.com, an on-line counseling web site highly rated by Mental Health Net (www.metanoia.org).

[5]See Russell, J. M. (1998, April). Philosopher as personal consultant. *The Philosopher's Web Magazine* [On-line]. Now archived, but available: this chapter's author's web page at http://members.aol.com/jmrussell/index.htm.

[6]Scott, J. S. (1996, December). *State responses to telemedicine licensing issues. HEALTHCARE FIN. MGMT.*, at 46.

[7]See Ex parte Reggel, 114 US 642 (1885); Appleyard v. Massachusetts, 203 US 222 (1906).

[8]See Hyatt v. People, 188 US 691 (1903); Munsey v. Clough, 196 US 364 (1905).

[9]See, e.g., Cybersell, Inc. v. Cybersell, Inc., 130 F3d 414 (9th Cir 1997); Bensusan v. King, 937 F Supp 295 (SDNY 1996); and McDonough v. Fallon McElligott, Inc., 1996 WL 753991 (SD Cal 1996).

[10]See, e.g., CompuServe v. Patterson, 83 F3d 1257 (6th Cir 1996); Minnesota v. Granite Gate Resorts, Inc., 568 NW2d 715, 719-720 (Minn. Ct. App. 1997), affirmed 576 NW2d 747 (Minn. 1998); and Zippo Manufacturing v. Zippo Dot Com, Inc., 952 F Supp 1119 (WD Pa 1997).

[11]Russell, J. M. (1998, October 24; 1999, May 7). *Philosophical counseling is not a distinct field.* Paper presented to the Southern California Philosophy Conference at UCI; revised and presented to the Group Meetings on Philosophical Counseling of the American Philosophical Association, Western Division, New Orleans [On-line]. Available at this chapter's author's web page at: http://members.aol.com/jmrussell/index.htm.

[12]See, e.g., Board of Trustees, S.U.N.Y. v. Fox, 492 US 469, 482 (1989); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976); Time, Inc. v. Hill, 385 U.S. 374, 397 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964); Burstyn v. Wilson, 343 U.S. 495, 502 (1952).

[13]See Spiritual Psychic Science Church v. Azusa, 39 Cal.3d 501, 217 Cal. Rptr. 225 (1985); Marks v. City of Roseburg, 65 Or App 102, 670 P2d 201 (1983), rev den 296 Or 536.

[14]See National Association for the Advancement of Psychoanalysis, et al. v. California Board of Psychology Members et al., USDC ND Calif. Civ. No. C-97-3913, Memorandum Decision and Order filed January 7, 1999, at page 14.

[15]See Abramson v. Gonzalez, 949 F2d 1567 (11th Cir 1992); Eckles v. Oregon State Bd. of Psychologist Examiners, USDC Oregon Civ. No. 92-945 (1994).

[16]See Hogan, D. B. (1979). *The regulation of psychotherapists* (Vol. 1, pp. 368–370). Cambridge MA: Ballinger. ("Psychotherapy does not meet the criteria for licensing through laws that restrict a person's right to practice. . . . If one looks at the available empirical evidence, current licensing laws . . . are difficult to defend. First of all, psychotherapy . . . does not appear to be gravely dangerous. . . . Assuming, however, that psychotherapy represents a significant public danger, the lack of consensus as to what causes the danger and how to measure it should prevent the enactment of laws restricting a person's right to practice. The existing empirical evidence suggests that licensing efforts to date have focused on the wrong variables. No evidence exists that possession of academic credentials protects the public. Instead, the findings indicate that personality factors may be the most influential in determining whether a therapist is competent to practice.") See also Grohol, J. M. (1998, March 1). *Why don't current psychotherapy licensing regulations work? A review and suggestions for change* [On-line]. Available: http://mentalhelp.net/archives/editor29.htm; and Schmitt, K. (1995, May). *An analysis of complaints Filed Against Mental Health Professionals in Colorado* (Report). Available from the Colorado Department of Regulatory Agencies, Mental Health Professions.

[17]See Hogan, D. B. (1979). *The regulation of psychotherapists* (Vol. 1, p. 371). Cambridge, MA: Ballinger. ("As a method of regulation, registration has much to recommend it. Entry into the field is not restricted, utilization of paraprofessionals is not inhibited, and the cost of services is not artificially increased. In fact, a system of registration produces few of the negative side effects created by traditional licensure. Registration recognizes that a consensus does not exist as to what standards and criteria are appropriate for measuring therapist effectiveness. Perhaps most important, rather than having the state make decisions for the consumer, registration laws allow the state to provide clients with relevant information and encourage the potential consumer of services to use careful judgment in selecting a professional.")

[18]See Schmitt, K. (1995, May). *An analysis of complaints filed against mental health professionals in Colorado* (Report, pp. 36–37). Available from the Colorado Department of Regulatory Agencies, Mental Health Professions. Among findings were that a smaller percentage of unlicensed psychotherapists—20%—than licensed psychologists—21%—had complaints filed against them, with a comparable percentage of nondismissed cases—5% and 4%—respectively.)